# FEDERAL CIRCUIT COURT OF AUSTRALIA

*ISLAM v MINISTER FOR IMMIGRATION & ANOR* *[2015] FCCA 1917*

Catchwords:
MIGRATION – Administrative Appeals Tribunal (Migration And Refugee Division) – Skilled (Residence) (Class VB) visa – procedural fairness – where applicant presented a bogus document – whether there was an obligation to adjourn the Tribunal proceedings for the taking of further IELTS exams – where the applicant had previously failed 20 IELTS exams – no jurisdictional error – application dismissed.

Legislation:
*Migration Act 1958* (Cth), ss.359A, 363, 476
*Migration Regulations 1994* Schedule 2, cl.855.224

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| Applicant: | MOHAMMAD MOINUL ISLAM |
| First Respondent: | MINISTER FOR IMMIGRATION & BORDER PROTECTION |
| Second Respondent: | ADMINISTRATIVE APPEALS TRIBUNAL |
| File Number: | SYG 1252 of 2015 |
| Judgment of: | Judge Street |
| Hearing date: | 15 July 2015 |
| Date of Last Submission: | 15 July 2015 |
| Delivered at: | Sydney |
| Delivered on: | 15 July 2015 |

## REPRESENTATION

No appearance by or on behalf of the Applicant

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| Counsel for the Respondents: | Mr D. Hughes |
| Solicitors for the Respondents: | Ms A. Carr<br>DLA Piper |

## ORDERS

(1) The name of the second respondent be corrected to the Administrative Appeals Tribunal and the filing of any further document in this regard is dispensed with.

(2) The application is dismissed.

(3) The applicant pay the first respondent's costs fixed in the sum of $6100.

(i)

# FEDERAL CIRCUIT COURT

# OF AUSTRALIA

# AT SYDNEY

## SYG 1252 of 2015

**MOHAMMAD MOINUL ISLAM**
Applicant

And

**MINISTER FOR IMMIGRATION & BORDER PROTECTION**
First Respondent

**ADMINISTRATIVE APPEALS TRIBUNAL**
Second Respondent

## REASONS FOR JUDGMENT

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) in respect of a decision of the Tribunal made on 9 April 2015 affirming a decision of the delegate not to grant the applicant a Skilled (Residence) (Class VB) visa. The applicant applied for the visa on 29 June 2011, and it was refused by the delegate on the basis that the applicant did not satisfy the requirements of cl.855.224 of Schedule 2 to the *Migration Regulations 1994*. This was on the grounds of the public interest criteria (PIC 4020) not being satisfied.

2. The Tribunal affirmed the decision under review on 29 May 2014, and the applicant sought a review of the Tribunal's decision. On 19

December 2014 an order was made by consent for the matter to be returned to the Tribunal for reconsideration. That order was apparently made on the basis of a note that a post-hearing submission had not been considered by the Tribunal. In respect of the fresh review hearing, the applicant appeared before the Tribunal on 5 March 2015 to give evidence and present arguments and was assisted by an interpreter.

3. This was a case where the applicant admitted to the Tribunal that he gave a forged a test result to the Department in order to satisfy the English requirements and proffered reasons for providing that bogus document. Notwithstanding those reasons, the Tribunal found the applicant knew that the document he provided was purposely untrue and that the applicant was also consciously committing a fraud or deception in giving this document to the department. It was in those circumstances that the Tribunal found they were satisfied that the IELTS test given by the applicant to the Department was a bogus document as it was a document that the Tribunal reasonably suspected was counterfeit or had been altered by the applicant and that he did not have authority to do so.

4. It was in these circumstances that the Tribunal found there was evidence that the applicant had given or caused to be given to the Minister or an officer a bogus document in relation to the application for the visa at hand. Hence the requirements of PIC 4020(1) were not satisfied in relation to this particular visa application. The Tribunal turned to the issue of the waiver requirements under PIC4020(4), which are as follows:

> *4020(4). The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:*
>
> *(a) compelling circumstances that affect the interests of Australia; or*
>
> *(b) compassionate and compelling circumstances that affect the interests of an Australian citizen, an Australia permanent resident or an eligible New Zealand citizen.*

5. Relevantly, the Tribunal found in that regard as follows;

> *36. First, on all the relevant evidence before it, the Tribunal is not satisfied that there are compelling circumstances that affect the*

*interests of Australia. Whilst Australia would not have the benefit of his cooking abilities, whether as a paid cook or as a community volunteer, or any other skills that he had obtained in Bangladesh or here, it does not consider that this is a compelling circumstance that affect the interests of Australia justifying the granting of the visa. Thus (a) is not met.*

*…*

*39. The Tribunal also considered his claim that he wishes to do more voluntary work with older Australian persons here in the future. It also accepts that he has some Australian permanent resident or citizen friends here who would miss him if he was not granted this visa and had to return to Bangladesh.*

*40. However, the Tribunal does not consider that these are sufficient to satisfy it that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, which would justify the grant of the visa. Thus (b) is not met either.*

*41. There being no basis for waiver, the applicant does not satisfy PIC 4020 for the purposes of cl.885.224. As this is the only relevant subclass, the decision under review is affirmed.*

*42. The Tribunal affirms the decision not to grant the applicant a Skilled (Residence) (Class VB) visa.*

6. The matter was listed for hearing today after directions were made on 11 June 2015. Those directions provided an opportunity for the applicant to file an amended application and put on further affidavit evidence as well as providing submissions. The applicant did not put on any further material. The matter was listed for hearing today at 11.15 am.

7. The matter has been called outside the Court, it now being 11:55am, and the applicant has failed to appear. There has been no communication to the Court by the applicant seeking an adjournment and no explanation for the failure to appear communicated to the first respondent. As the matter was fixed for hearing, the Court has dealt with the matter on its merits. In relation to ground 1, I accept the first respondent's submission that the unparticularised allegations fail to identify any legal or procedural error.

8. I accept the first respondent's submission that the Tribunal correctly identified the applicant needed to satisfy PIC 4020 because of cl.885.224 of Schedule 2 of the *Migration Regulations*. I accept the first respondent's submission that the Tribunal applied the correct test in determining whether the applicant had given a bogus document to the Minister. I accept the first respondent's submissions that those findings were open based on the admissions made by the applicant and the material before the Tribunal. I accept the first respondent's submission that the Tribunal correctly considered the discretionary issues as to whether the condition should be waived and that the adverse determination was open on the material before the Tribunal.

9. There is no substance in relation to ground 1. In relation to ground 2, I accept the first respondent's submission that the allegation of bias is also unparticularised and on that ground alone cannot be made out and is not clearly proven. I also accept the first respondent's submission that a fair minded person taking into account the admissions by the applicant in respect of the bogus document would not by reason of the adverse findings by the Tribunal, believe that the Tribunal might not bring an independent and impartial mind to the determination of the matter on its merits. There is no substance in relation to ground 2.

10. In relation to ground 3, I accept the first respondent's submission that the applicant was well aware of the critical allegation in respect of the bogus document and had admitted that the document was bogus and was alive to the waiver issues and that there was no denial of natural justice or procedural fairness by the Tribunal in its conduct of the review. I accept the first respondent's submission that there was no breach of s.359A as the test information was falsified and fell within the exclusion under s.359A(3)(b).

11. I accept the first respondent's submission that there is no substance in the suggestion that the Tribunal was required to adjourn the matter. The applicant did not request an adjournment, albeit that the applicant had booked further tests in circumstances where the applicant had taken the test 20 times without success. It cannot be said that the decision of the Tribunal to proceed with the review lacks an evident and intelligible justification. I accept the first respondent's submission

that there is no substance in the assertion of any unreasonableness in the Tribunal proceeding with the review.

12. I accept the first respondent's submission that there was no requirement in the present case arising under s.363 for the Tribunal to adjourn the matter and that there was no jurisdictional error made out as alleged in grounds 3 and 4 of the application. I also accept the first respondent's submission that proceeding with the review was in the circumstances of this case consistent with the Tribunal's obligations under s.363. The application is dismissed.

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**I certify that the preceding twelve (12) paragraphs are a true copy of the reasons for judgment of Judge Street**

Associate:

Date: 17 July 2015